

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 25 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0291-PR
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
ANTHONY ALFREDO TORRES,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-66802

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Anthony A. Torres

Winslow  
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, petitioner Anthony Torres was convicted of one count of burglary and two counts of aggravated assault with a deadly weapon. The trial court sentenced him to concurrent, partially aggravated terms of imprisonment, the longest of which was fourteen years. The court based Torres's sentence on the following circumstances: (1) his prior felony record, which included "aggravated assault behavior"; (2) the apparently gang-related nature of his offenses; (3) his failure to benefit from previous rehabilitation opportunities; and (4) the danger he posed to the public. This court affirmed his convictions and sentences on appeal, *State v. Torres*, No. 2 CA-CR 2000-0149 (memorandum decision filed June 2, 2003), and our mandate issued on August 26, 2003.

¶2 In September 2000, Torres filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Due to his appointed counsel's administrative error in reassigning his case, Torres filed his petition for post-conviction relief in 2008, apparently with leave of the trial court. In that petition, Torres argued he was entitled to relief because the court had imposed an aggravated sentence in violation of his Sixth and Fourteenth Amendment rights as articulated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004).

¶3 The trial court summarily dismissed the petition, providing alternative grounds for its ruling in its dismissal order. First, the court found Torres's claim was precluded pursuant to Rule 32.2(a) because it could have been raised on his direct appeal, which was briefed in 2002. In addition, the trial court determined Torres's partially aggravated

sentences were constitutional because the court had found beyond a reasonable doubt that he had two historical prior felony convictions based on evidence in his presentence report. *See* 1999 Ariz. Sess. Laws, ch. 211, § 10 (trial court may find past felony conviction aggravating circumstance); *State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005) (if one aggravating circumstance properly found, trial court may find additional aggravators and impose up to maximum sentence within statutory range).

¶4 In his petition for review, Torres again argues that *Apprendi* and *Blakely* applied to his case and prevented the court from imposing a sentence greater than the presumptive term, because the jury found no aggravating circumstances and his prior conviction “was never proven in any hearing nor admitted to by [Torres].” Yet neither *Apprendi* nor *Blakely* applies here.

¶5 *Blakely* is not retroactive and only applies to convictions not yet final at the time it was decided in 2004. *State v. Febles*, 210 Ariz. 589, ¶ 7 & n.4, 115 P.3d 629, 632 & n.4 (App. 2005). “A conviction is final when ‘a judgment of conviction has rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.’” *Id.* ¶ 9, quoting *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003). Torres’s convictions became final when our mandate issued in August 2003, before *Blakely* was decided. Thus, *Blakely* does not apply to this case.

¶6 Torres suggests that he is nonetheless entitled to relief under *Apprendi*, a precursor to *Blakely* that was decided before his case became final. But, as we observed in

*Febles*, the *Apprendi* opinion did not itself require a jury to find aggravating factors beyond a reasonable doubt under Arizona’s sentencing scheme. *Febles*, 210 Ariz. 589, ¶ 11, 115 P.3d at 633. Therefore, Torres is not entitled to relief on that basis.

¶7 And, insofar as Torres otherwise attempts to challenge the legality of the sentences imposed, *see* Ariz. R. Crim. P. 32.1(c), his claim is precluded by Rule 32.2(a)(1). Because Torres has not asserted any other grounds for post-conviction relief, the trial court did not abuse its discretion in summarily dismissing his petition. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We therefore grant review but deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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GARYE L. VÁSQUEZ, Judge

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JOSEPH W. HOWARD, Judge